11-25-2011

Athay v. Rich County Appellant's Reply Brief Dckt. 38683

IN THE SUPREME COURT OF THE STATE OF IDAHO

KYLE ATHAY, Plaintiff/Respondent, vs. RICH COUNTY, UTAH, a political subdivision of the State of Utah, Defendants/Appellant.	**APPELLANT'S REPLY BRIEF** **for** **RICH COUNTY, UTAH** DOCKET NO. 38683-2011

Appeal from the District Court of the Sixth Judicial District for Bear Lake County
The Honorable Mitchell W. Brown – District Judge – Presiding

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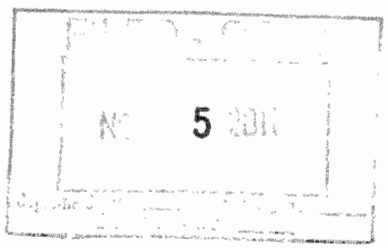

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I.

ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. The Reckless Disregard Determination Inherently Requires a Comparison of Stacey's Conduct With That of Ludwig and Athay.

When this lawsuit was initially filed, the Plaintiff alleged that three officers, Gregg Athay ("Athay"), Chad Ludwig ("Ludwig") and Rich County Sheriff Dale Stacey ("Stacey"), caused or contributed to the Plaintiff's injuries based on their actions taken in participating in the pursuit. Under Idaho law, these officers were only liable to the Plaintiff if their actions amounted to "reckless disregard." I.C. § 49-623. Athay and Ludwig were dismissed from the suit after this Court determined that neither one of these officers acted with reckless disregard. The Court's analysis of these officers' actions is critical not only because it defines certain appropriate police conduct in the context of this pursuit, but also because it requires a comparison of Stacey's actions with those of Ludwig and Athay.

In dismissing the Plaintiff's claims against Ludwig, this Court concluded that "there is absolutely nothing in the record showing that Deputy Ludwig operated his vehicle with reckless disregard for the safety of others or that his conduct induced Ervin to continue fleeing at a high rate of speed." *Athay v. Stacey*, 128 P.3d 897, 906-7 (Idaho 2005) ("*Athay I*"). The conduct on the record included:

> 1) The use of spike strips in an attempt to stop the Mustang, despite the fact that Ludwig did not know with certainty whether the vehicle he spiked was the fleeing vehicle until after the vehicle ran over the spikes[1];

[1] See *Athay I* at 907 ("[Ludwig] had not been given a description of the car he was to attempt to stop... but correctly assumed it was the Mustang.").

2) Ludwig's joining in the pursuit during its final eight miles; and

3) Ludwig's involvement in the pursuit through Montpelier, including "fanning out," for greater visibility.

Athay I at 907.

In *Athay II*, this Court concluded that the following conduct did not show that Athay acted with reckless disregard:

1) Dispatching Ludwig to attempt to stop the fleeing vehicle with spike strips;

2) Joining the pursuit behind Stacey and remaining involved until the pursuit terminated;

3) Requesting police traffic control assistance as the pursuit passed through Montpelier;

4) Requesting that Caribou County attempt to stop the vehicle with spike strips.

Athay v. Stacey, 196 P.3d 325, 333-34 (Idaho 2008) ("*Athay II*").

As a result of this Court's holdings in *Athay I* and *Athay II*, Stacey could not be found to have acted with reckless disregard based upon his calling ahead to request assistance from other police agencies, requesting that Bear Lake County attempt to stop the Mustang using spike strips, fanning out for greater visibility through Montpelier, or continuing the final eight miles of the pursuit. Hence the Jury's determination necessarily relied upon a consideration of how and to what extent Stacey's actions differed from the appropriate actions of Ludwig and Athay. Only if the Plaintiff showed that Stacey acted differently and more "recklessly" than Ludwig and Athay could the Jury conclude that Stacey acted with reckless disregard and thereby find Rich County liable to the Plaintiff[2].

[2] Rich County raised this precise issue in the Jury Instruction Conference, asking that the Court instruct the Jury in accordance with this Court's prior holdings as to the conduct of Ludwig and Athay. The District Court declined Rich County's request.

B. The Plaintiff Did Not Introduce Any Evidence That Ervin Knew He Was Being Pursued.

There is no question Stacey's conduct differed from that of Ludwig and Athay in one material way, that being Stacey's involvement in the pursuit prior to crossing into Idaho. Since the inception of this lawsuit, the Plaintiff's theory has been that Stacey (and the other officers) "initiated" and encouraged the pursuit by following the Mustang at high speeds through three states. In other words, the Plaintiff has argued that but for Stacey's continuing to follow the Mustang, the Mustang would have stopped or slowed down because there would be nothing to "flee" from. However, the Plaintiff did not introduce a single piece of evidence to show that Ervin knew that he was being pursued by law enforcement on June 10, 1999 and therefore failed to show that Stacey's conduct had any role in causing or contributing to the collision in question.

On the evening of the collision, Idaho State Trooper W.D. Jones and Ludwig interviewed Ervin. Tr. Vol. 7, p. 62-63. In response to being informed that he was being charged with felony eluding, Ervin claimed that he did not know who he was eluding and had not seen any police officers that night. *Id.* at 63, L. 10-24. At trial, Ervin testified that he had no recollection of the pursuit or the collision itself. Tr. Vol. 5, p. 28, L. 10-18. There was simply no evidence to support the Plaintiff's assumption that Ervin knew Stacey was following him.

C. The Plaintiff Failed To Prove All Elements of the Reckless Disregard Standard.

In order to prove that Stacey acted with reckless disregard, the Plaintiff needed to introduce evidence to show: 1) Stacey's conduct created an unreasonable risk of bodily harm; 2) Stacey knew of the high degree of probability that the harm suffered by the Plaintiff would result from his conduct; and 3) Stacey continued his conduct despite his knowledge of the risk of harm. *Athay II* at 332; see also *Harris v. State*, 847 P.2d 1156, 1160 (Idaho 1992).

First, there was no evidence introduced at trial to prove that Stacey's actions *created* an unreasonable risk of harm. Stacey attempted to stop a drunk driver based upon his erratic and dangerous driving patterns, and upon that driver fleeing pursued the fleeing felon. For whatever reason, the driver did not stop and continued to drive in a dangerous and reckless manner, endangering innocent motorists in three states. Stacey neither initiated the driver's dangerous behavior nor was there evidence that he increased the risk of harm to others. The jury could not have appropriately concluded that the first element of reckless disregard was proven.

The Plaintiff argues that there were several facts showing that Stacey "knowing of the inherent dangers of [the] pursuit – chose to continue the chase." *Respondent's Brief*, p. 36. This statement significantly minimizes and misrepresents Stacey's testimony. While it is true that Stacey testified that he understood and appreciated that a police pursuit involves risks, as does any operation of a motor vehicle, he also testified extensively that he understood and appreciated the risk of letting an intoxicated motorist and reckless driver simply drive away. Stacey weighed the risk of these options, and determined that he would continue to follow the vehicle, but would radio to police agencies down the road, ahead of the drunk driver, so that these agencies could intercept the vehicle. Stacey ***never intended*** to pursue the vehicle through 3 states and there was no evidence or testimony that Stacey was trying to "catch up" to the Mustang and stop the driver himself. Stacey continued to radio ahead to other police agencies, fully expecting that the other law enforcement officers he knew worked in the area would be able to stop the Mustang. Unfortunately, it just so happened that every officer who would have ordinarily been able to help was busy that night or was unable to respond in time.

The evidence introduced at trial was not conclusive proof that Ervin's high-speed, out of control driving was the direct consequence of Stacey's decision to continue following Ervin.[3] The Plaintiff did not introduce any testimony or evidence from any officer or expert witness that called into question Stacey's decision to follow or continue following the Mustang. Contrary to the Plaintiff's statement that Stacey knew the Mustang's registered owner's address during the pursuit, all Stacey knew was that the Mustang was registered "to a Dora D. Gilgen or Billie Deen Ellett out of Soda Springs, Idaho." Defendant's Exh. 203, p. 1. This information would not have conclusively or directly led Stacey to the fleeing driver, particularly in light of the fact that Stacey did not know who the driver was or if the Mustang was stolen.

D. The Plaintiff Is Not Entitled to Attorney Fees on Appeal.

The Plaintiff requests attorney's fees pursuant to I.C. § 12-121 and I.A.R. 41, apparently based on his argument that Rich County's appeal "merely invites the court to second guess the findings of the lower court."[4] *Respondent's Brief*, p. 13 (citing *Crowley v. Critchfield*, 181 P.3d 435, 440 (2007)). The only context in which the Plaintiff has alleged that Rich County has invited such "second-guessing" is its Motion for Judgment Notwithstanding the Verdict ("JNOV"). Id., p. 33.

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[3] The Plaintiff argued that Ervin's slowing down through Cokeville, Wyoming and then speeding back up again as he left Cokeville shows that he knew Stacey was behind him. Stacey testified that he was able to catch up to Ervin when he slowed through Cokeville, so the Plaintiff's theory was that at this point, Ervin sped up again. However, the testimony was that Ervin slowed down to around 45 miles per hour for the whole time he drove through Cokeville. Stacey did not testify that Ervin sped up as soon as he saw Stacey had caught up, but rather sped up when he left Cokeville and the speed limit increased. The evidence actually tends to show that Ervin only slowed in Cokeville to avoid being pulled over for speeding, not because he thought he had lost Stacey.

[4] The Plaintiff also states that "[a]ttorney's fees may…be awarded under section 12-121 if the appeal is brought or defended frivolously, unreasonably or without foundation." *Id.*, p. 13.

The Plaintiff has not submitted any argument to support his alleged entitlement to attorney's fees aside from pointing out the grounds for which attorney fees may be awarded under I.C. § 12-121. Absent any facts indicating that Rich County's JNOV, or any other part of this Appeal, was "brought or defended frivolously, unreasonably, or without foundation,"[5] the Plaintiff has failed to establish his entitlement to an award of fees and the Court should deny the Plaintiff's request.

II.

MOTION FOR A NEW TRIAL (Ex Parte Contacts)

A. The Plaintiff Waived All of His Procedural Objections to Rich County's First Motion for a New Trial.

With respect to Rich County's Motion for a New Trial ("First Motion"), the issue on appeal is whether the District Court committed error in denying the First Motion, which this Court will review for an abuse of the trial court's discretion. The question of whether a trial court abused its discretion is based on three inquiries, those being whether the trial court:

> "(1) recognize[d] the issue as one of discretion, (2) act[ed] within the boundaries of its discretion and applie[d] the applicable legal standards, and (3) reache[d] the decision through an exercise of reason."

Sun Valley Shopping Ctr., Inc. v. Idaho Power Co., 803 P.2d 993, 1000 (Idaho 1991). In other words, this Court's review for an abuse of discretion review is focused on ***what the district court did*** with ***the information it had before it***. Therefore, only those facts and arguments that were before and considered by the district court should be considered on appeal.

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[5] "When deciding whether attorney fees should be awarded under I.C. § 12-121, the entire course of the litigation must be taken into account and if there is at least one legitimate issue presented, attorney fees may not be awarded even though the losing party has asserted other factual or legal claims that are frivolous, unreasonable, or without foundation." *Michalk v. Michalk*, 220 P.3d 580, 591 (Idaho 2009) (citing *McGrew v. McGrew*, 82 P.3d 833, 844 (Idaho 2003)). Rich County has certainly presented numerous valid issues throughout the long history of this litigation, and therefore the Plaintiff is not entitled to attorney fees.

The District Court, on its own initiative, denied the First Motion based on Rich County's "failure to support the motion with an affidavit," as required by I.R.C.P. 59(a)(1). In opposing the First Motion, the only arguments advanced by the Plaintiff in both his briefs or during oral argument were substantive arguments about the whether the ex parte communications had any impact on the jury. "The rule is well settled that a party cannot avail himself of a defense for the first time in the appellate court, nor will a question not raised in the trial court be considered on appeal." *Webster v. Potlach Forests*, 187 P.2d 1, 17 (Idaho 1947) (quoting *Grant v. St. James Mining Co., Ltd.*, 191 P. 359, 359 (Idaho 1920)).

The Plaintiff did not, in any way, object to the fact that Rich County did not file an affidavit with its First Motion nor did he contend that Rich County's alleged knowledge of the ex parte contacts effectively barred Rich County from asserting these contacts as grounds for a new trial. Moreover, the Court itself never mentioned Rich County's alleged "knowledge" in its Memorandum Decision and Order and did not inquire about it during the November 18, 2010 Hearing on the First Motion. Therefore the Plaintiff cannot now argue that the lack of an affidavit was prejudicial or that Rich County waived its objections to the ex parte communications and the Court should not consider these arguments.

B. The Plaintiff Was Not Prejudiced by the Fact That Rich County Did Not File an Affidavit.

The Plaintiff's argument that he was unaware of the specific facts Rich County would assert as grounds for its First Motion defies logic and is without merit. Rich County's Memorandum in Support of its First Motion, filed along with the First Motion, clearly explains that the First Motion is exclusively based on the ex parte communications that the Court disclosed during the September 16, 2010 Status Conference. Rich County further explained:

> "Defendant has no idea the subject or subjects of the conversations, no idea how many text messages were sent and no idea if it was on a single date, over a span of days or weeks."

R. Vol. 2, p. 317.

The facts upon which Rich County's Motion was based were obvious to the Court and the Plaintiff. It is clear from the Supporting Memorandum that Rich County had no knowledge or information beyond that disclosed by the Court during the Status Conference. In fact, Rich County requested in the alternative that the Court order production of all of the ex parte communications. There is simply no "suggestion" or indication that Rich County would assert other facts as grounds for its First Motion.

The Plaintiff's conduct was the subject of the September 16, 2011 Status Conference and certainly he had and has the greatest knowledge of anyone besides Peck as to the nature and extent of his improper ex parte communications. In fact, most the "details" of the ex parte contact that were argued by Rich County actually came from the Plaintiff's Affidavit provided in response to the First Motion. The Plaintiff cannot say, in good faith, that Rich County knew more than he did about his own conduct and was in no way prejudiced or disadvantaged by the lack of an affidavit "stating in detail the facts relied upon."

C. Rich County Had No Knowledge of the Ex Parte Communications.

The Plaintiff incorrectly states that during the September 16, 2010 Status Conference, Rich County's counsel informed the Court that "they had been was aware of contact between [Brandy Peck ("Peck")] and [the Plaintiff], but chose not to report it." *Respondent's Brief*, p. 19. In actuality Rich County's counsel, Blake Hamilton[6], stated "We did have some ***concerns*** about

[6] Mr. Hamilton was not present during the trial with the exception of closing arguments and was handling the telephonic status conference because Rich County's trial counsel was trying a Federal criminal case in the Southern District of Florida at the time.

the communication between Brandy [Peck] and the Plaintiff during the trial." Tr. Telephone Conf., p. 5, L. 5-6 (emphasis added). Mr. Hamilton further clarified, "[a]s I recall the conversations about the concerns that we had, I believe that they were at the beginning of the trial and ...[w]e didn't notice any further continuance of those conversations. I believe that is why it wasn't brought up then." *Id.* at 6-7.

Mr. Hamilton never stated that Rich County's counsel knew that the Plaintiff and Peck were communicating several times a day, both during and after the trial day, or sending hundreds of text messages over the course of the trial because Rich County's counsel did not know any of those things were happening. Mr. Hamilton accurately reported that Rich County had some general concerns stemming from Peck's courtroom demeanor and counsel's observing Peck in the hallway with the Plaintiff outside the courtroom during a recess. These observations did not conclusively indicate that Peck and the Plaintiff were having some inappropriate contact much less a full-blown personal relationship as was actually the case. Rich County's concerns were just that – ***concerns***, not actual knowledge of the ex parte communications at issue. The Plaintiff's suggestion is absolutely incorrect and thus his argument, even if it is not waived, is entirely lacking in merit.

D. Rueth's Burden-Shifting Analysis Applies to the Rich County's First Motion.

The issue raised in Rich County's First Motion is whether the Plaintiff's misconduct, that is, his ex parte communications with the District Court's deputy clerk, prevented Rich County from having a fair trial. In *Slaathaug*, the plaintiffs moved for a new trial after they learned that the defendant insurance company provided daily trial transcripts to defense witnesses in violation of the exclusionary rule. *Slaathaug v. Allstate Ins. Co.,* 979 P.2d 107 (Idaho 1999). The Court held that "where a motion for a new trial under I.R.C.P. 59(a)(1) is based upon ***misconduct***, the

moving party has only the burden to establish that the misconduct occurred. The party opposing the motion must then establish that the conduct could not have affected the outcome of the trial." Id., at 112 (citing *Hinman v. Morrison-Knudsen Co.*, 771 P.2d 533 (Idaho 1989); *Rueth v. State*, 596 P.2d 75, 80 (Idaho 1979)) (emphasis added).

The Court explained "[i]n Idaho, it is definitely not the case that the losing party has the double burden of showing both that a ...violation has *and* that 'actual prejudice' has resulted." *Id.*; (quoting *Rueth,* 596 P.2d at 80) (emphasis in original). This approach, the Court reasoned, makes particular sense in a case where the non-moving party's misconduct is at issue because s/he is in the "best position to present evidence of prejudice or lack thereof." *Id.*, at 113. Accordingly, once the Slaathaugs established that the insurance company had provided transcripts in violation of the exclusionary rule, the burden shifted to the insurance company to show the content of the transcripts provided and that the violation could not have had any effect on the verdict. *Id.*

The facts of *Slaathaug* are analogous to the instant case. Rich County's First Motion alleges that the Plaintiff engaged in misconduct by engaging in extensive ex parte communication and contact with Peck. The District Court, as well as the Plaintiff, admits that this behavior was improper and should never have occurred. Therefore, Rich County has met its burden under the first prong of the Rueth analysis. It is then the Plaintiff's burden to show ***both*** the content of these communications and that the misconduct ***could not*** have affected the trial's outcome.

Just as the insurance company in *Slaathaug* was in the best position to explain the details of their misconduct, the Plaintiff is one of only two people who actually knows and can explain the substance of his ex parte communications with Peck. No one was present during the ex parte

contacts except for the Plaintiff and Peck. Even the Court was unaware as to the precise details of these conversations because it received its information second-hand, by overhearing a discussion between court staff members in chambers. It is only logical that the Plaintiff here must bear the burden of showing what those communications were.

Moreover, as the party that engaged in the misconduct, the Plaintiff bears the burden of proving that the communications could not have had any effect on the jury. The District Court erroneously based its substantive determination on Rich County's failure to affirmatively prove that the ex parte communication caused prejudice or improper jury influence, but this is not what the *Rueth* standard requires. Instead, the Plaintiff must show that his misconduct ***could not*** have had ***any*** impact on the jury and/or prevented Rich County from having a fair trial. See *Slaathaug*, 979 P.2d at 112 (emphasis added).

E. The Plaintiff Failed to Show that the Communication Could Not Have Affected the Trial's Outcome.

The District Court abused its discretion when it concluded that the ex parte communications did not affect the trial's integrity or prevent either party from having a fair trial because the Plaintiff failed to meet the minimum showings under *Rueth's* four-prong analysis. The Plaintiff did not sufficiently demonstrate the content of the ex parte communications such that the District Court could even begin to determine their potential prejudicial impact. The information that the Plaintiff did disclose regarding the communications suggests that these improper communications very likely may have denied Rich County a fair trial.

For example, the Plaintiff and Peck testified that they did not remember the specifics of their communications, but the only specific conversations that either of them could recall was once where Peck asked the Plaintiff about how he felt the trial was going, and once where the Plaintiff mentioned to Peck that he was "frustrated" with the trial and was happy to have Peck's

"smiling face." Tr. Hr'g, November 18, 2010, p. 36-37 & 41. There is no question that the Plaintiff and Peck discussed the trial on at least two occasions and this totally inappropriate exchange of information between the Plaintiff and a member of the Court's staff could very well have made its way to the Jury[7].

In *Slaathaug*, the trial court first considered the possible methods for curing the defendant's misconduct[8] but concluded that all of these methods were no longer available because the misconduct was only revealed after trial. The trial court granted the Slaathaugs' motion for a new trial for two reasons. First, "[t]he prejudice to the plaintiff is difficult, if not impossible, to measure because there is no way of knowing what the testimony would have been had the violation not occurred," and thus a new trial is a more suitable remedy than those that would have been available during trial. *Id.* Also, "[o]rdering a new trial...serves as a deterrent "to discourage future violations...." *Id.*

Rich County and Plaintiff's counsel only became aware of Plaintiff's and the trial court's staff's improper conduct after the trial. The District Court had the opportunity to make Rich County and the Plaintiff's counsel aware of the situation during the trial, but for whatever reason chose not to. This was the District Court's first abuse of discretion, because in failing to disclose the inappropriate conduct and allowing the parties to voice their objection when something could have feasibly been done to correct the situation, the District Court effectively denied Rich County a fair trial.

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[7] The juror affidavits referred to in *Respondent's Brief* were stricken by the Court and are not part of the Clerk's Record for this Appeal. These affidavits are therefore irrelevant and it was improper for the Plaintiff to mention them in his Brief.

[8] The remedies listed by the trial court were: 1) citing the violating witness for contempt, 2) permitting the injured party to comment on the violation, 3) refusing to let the violating witness testify, and 4) striking the violating witness' testimony. Id., at 112.

The District Court also abused its discretion in determining, without any evidence to support such a conclusion, that the misconduct was only "harmless error." Much like the situation in *Slaathaug*, there is no way of knowing whether or to what extent the Plaintiff's inappropriate relationship with Peck was known by jury or influenced the ultimate result of the trial and thus Rich County should have been granted a new trial under the *Rueth* analysis. Moreover, the District Court's decision does nothing to deter future misconduct on the part of parties or its own court staff. Judge Brown acknowledged that Peck was not truthful to him during the trial when she told him that she had ended the ex parte contacts with the Plaintiff. Obviously Judge Brown's admonitions alone were pitifully insufficient to stop her improper behavior. At this point, the Plaintiff has essentially gotten away with breaking what should have been an obvious rule, that being to refrain from personal, ex parte communications and a relationship with the trial court. This Court should not allow such behavior in Idaho's district courts, particularly to the very likely detriment of innocent parties.

III.

Motion to Strike Rich County's Second Motion for New Trial

A. The District Court's Reading of the *Kuhn* Decision is Material to Rich County's Appeal.

With respect to Rich County's Motion for New Trial[9] ("Second Motion"), the issue on appeal is whether the District Court erred in granting the Plaintiff's Motion to Strike Rich County's Motion for New Trial based upon its reliance on *Kuhn v. Coldwell Banker Landmark,* 245 P.3d 992 (Idaho 2010). The District Court's decision was expressly and solely based its

[9] This Motion, as filed, is entitled "Rich County's Motion for New Trial or Alternatively for Judgment Notwithstanding the Verdict." Although these two issues were raised in a single motion, Section III of Appellant's Reply Brief only pertains to the first part, that being the Motion for New Trial.

determination that *Kuhn* overruled the Court's holding in *Nations*, (*Nations v. Bonner Bldg. Supply,* 746 P.2d 1027 (Idaho Ct. App. 1987)), which was actually cited by the Plaintiff in support of his position that Rich County's Motion should be stricken. The District Court explained:

> "[I]f the analysis were complete with the Court's reading and interpretation of *Nations*, the Court would conclude that it was within the Court's discretion to determine whether or not to dismiss the motion for new trial or strike the same as requested by Athay. ***The Court would also refuse Athay's request to strike based upon the logic and holding in Nation[s]***."

R., p. 507 (emphasis added).

The Plaintiff agrees that the District Court was incorrect in concluding that *Kuhn* overruled *Nations*. *Respondent's Brief*, pp. 27-32. Absent the District Court's erroneous conclusion that *Kuhn* overruled Nations, it would ***not*** have granted the Plaintiff's Motion to Strike and would have considered the merits of Rich County's Second Motion. An erroneous conclusion of law is not a matter of discretion. Therefore, this Court should reverse the District Court's decision on the Plaintiff's Motion to Strike and remand for consideration of the Second Motion's substantive arguments.

B. The District Court Would Not Have Abused its Discretion if it had Denied the Plaintiff's Motion to Strike.

Rich County does not contend that the particularity requirement does not apply to motions for a new trial made pursuant to I.R.C.P. 59(a)(6) or (7). Instead, the issue is whether the particularity requirement must be satisfied within the time period set forth in I.R.C.P. 59(b). As the District Court explained, *Nations* states that there is nothing in Rule 59 or in the case law that requires that the particular grounds supporting a motion for a new trial be set forth in the motion itself or within the 14-day time period in Rule 59(b). The Plaintiff has not cited a single case or

advanced any convincing argument to the contrary, nor does the Plaintiff contend that *Kuhn* or any other subsequent case overruled *Nations*.

There is no question that Rich County did, in fact, satisfy Rule 59's particularity requirement in its Memorandum in Support of the Second Motion, which was filed within the time limits set forth in I.R.C.P. 7. The District Court accepted Rich County's Memorandum and heard oral argument on the Motion. The Plaintiff was provided the requisite opportunity to review the Memorandum, prepare a response, and argue his Opposition. Therefore, it would have been appropriate for the District Court, in its discretion, to deny the Plaintiff's Motion to Strike and consider Rich County's substantive arguments advanced in its second Motion as it stated it would have but for its incorrect interpretation of *Kuhn*. Since the parties agree that *Kuhn* did not overrule *Nations*, this Court should reverse the District Court's decision to strike the Second Motion and remand for consideration of its substantive issues.

CONCLUSION

For the foregoing reasons, and those reasons contained in *Appellant's Brief for Rich County, Utah*, Appellant Rich County respectfully requests that this Court reverse the District Court's decisions as to Rich County's Motion to Disqualify and First Motion for a New Trial. The facts indicate that the District Court's decisions were based upon biased analysis of procedural issues and were clearly an abuse of its discretion. Appellant further respectfully requests that this Court reverse the District Court's decisions striking Rich County's Second Motion for a New Trial because the parties agree that this decision was solely based on an erroneous legal conclusion. Finally, since there was insufficient evidence introduced at trial to support the Jury's finding that Stacey acted with reckless disregard, this Court should reverse the District Court's denial of Rich County's Alternative Motion for Judgment Notwithstanding the

Verdict. Accordingly, this court should correct the errors in the record and set aside the verdict and order a new trial.

DATED this 23 day of November, 2011.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of November, 2011, a true copy of the foregoing **APPELLANT'S REPLY BRIEF FOR RICH COUNTY, UTAH** was served by the method indicated below, to the following:

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